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10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA

12 ROBERT ALEXANDER KASEBERG,
13

14 Plaintiff,

15 v.

16 CONACO, LLC; TURNER
BROADCASTING SYSTEM; TIME
17 WARNER, INC.; CONAN O'BRIEN;
JEFF ROSS; MIKE SWEENEY; DOES
18 1-50, inclusive,

19 Defendants.

CASE NO.: 15-CV-01637-JLS-DHB

Hon. Janis L. Sammartino

**MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND/OR
PARTIAL SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION**

[PUBLIC VERSION]

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1 Defendants Conaco, LLC, Conan O'Brien, Jeff Ross, and Mike Sweeney
 2 ("Conan Defendants"), Turner Broadcasting System, Inc., Time Warner Inc. ("Turner
 3 Defendants") (collectively, "Defendants"), hereby submit this memorandum of points
 4 and authorities in support their Motion For Summary Judgment And/Or Partial
 5 Summary Judgment Or, In The Alternative, Summary Adjudication, as follows:

6 **I. INTRODUCTION**

7 *Conan* is a popular late-night talk show that airs on TBS. Like many other late-
 8 night talk shows, *Conan* starts with a monologue featuring short "monologue-style"
 9 jokes. A monologue-style joke generally includes a factual setup based on a trending
 10 news or media story, followed by a comedic punchline. *Conan*'s monologue is
 11 developed through a thorough creative process which encompasses a team of writers
 12 and involves multiple content submissions and rounds of review.

13 Plaintiff Robert Alexander Kaseberg ("Kaseberg") [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]

20 According to Kaseberg, as he was watching *Conan* in early 2015, he noticed
 21 similarities between his jokes and *Conan*'s monologue jokes. Subsequently, Kaseberg
 22 called Defendant Mike Sweeney, then the head writer at *Conan*, and accused *Conan*
 23 of using his material. During the call, Kaseberg unsuccessfully tried to leverage his
 24 accusations into a job writing for *Conan*. Months later, Kaseberg filed this lawsuit
 25 against Defendants alleging copyright infringement as to five of his jokes.

26 Kaseberg's copyright infringement claims are completely frivolous. First,
 27 Kaseberg failed to register two of his five asserted copyrights, and therefore lacks
 28 standing to assert copyright infringement as to these two jokes. Second, Kaseberg

1 must establish copying to prove copyright infringement. But two of the accused jokes
 2 were created by *Conan*'s writers **before** Kaseberg published his jokes for the first
 3 time. Thus, as a matter of law and logic, Defendants could not have copied jokes they
 4 created first, and could not have infringed these two jokes. Third, Kaseberg lacks *any*
 5 evidence of direct infringement, as well as *any* evidence to establish Defendants'
 6 access to Kaseberg's jokes. In fact, Kaseberg's access theory is based solely on the
 7 fact that he posted his jokes online, which is legally insufficient to establish access.
 8 Fourth, as any similarities between them are limited to unprotectable facts and ideas,
 9 Kaseberg cannot establish the requisite level of similarity necessary to sustain an
 10 infringement claim. Specifically, Kaseberg's jokes are composed almost entirely of
 11 unprotectable elements. Thus, they are entitled to "thin" protection at best, which only
 12 protects against virtual copying. And an objective comparison of the jokes
 13 demonstrates they are not virtually identical, and thus, cannot support an infringement
 14 claim. Fifth, the *Conan* Defendants independently created their jokes, which is a
 15 complete defense to infringement. Finally, the Court should grant summary
 16 adjudication as to Defendants' nonwillfulness, since Kaseberg failed to present any
 17 evidence that any alleged infringement was willful.

18 **II. STATEMENT OF FACTS**

19 **A. The Parties**

20 *Conan* is a late-night talk show that airs on TBS. UF 1. Conan O'Brien created
 21 and hosts *Conan*. UF 2. Jeff Ross is *Conan*'s executive producer. UF 3. Mike
 22 Sweeney was *Conan*'s head writer during all times relevant to this lawsuit. UF 4.
 23 Turner Broadcasting System, Inc. owns and operates the network TBS. UF 5. Time
 24 Warner Inc. is Turner's ultimate parent company. UF 6.

25 [REDACTED] UF 7. [REDACTED]

26 [REDACTED]

27 [REDACTED] UF 8. [REDACTED]

28 [REDACTED] UF 9.

1 **B. Conan's Creation Process**

2 *Conan* airs Monday through Thursday, over forty weeks each year. UF 1. Each
3 show opens with O'Brien delivering a monologue to a live studio audience. UF 10.
4 Four monologue writers and O'Brien create *Conan's* monologues. UF 11.

5 In preparing the monologue, the writers follow a specific daily routine. To
6 begin, the monologue writers typically spend the first hour of each workday crafting
7 premises from the day's news headlines. UF 12. Each writer visits their own short list
8 of specific, online news websites to source their premises. UF 13. Premises crafted by
9 monologue interns are also circulated each morning. UF 14. The interns are required
10 to indicate the website from which they sourced the premise with their submissions.
11 UF 15. Notably, the monologue writers do not research social media profiles, conduct
12 general google searches, or review content on other comedians' blogs, social media,
13 or personal websites for their premise research. UF 16. Following the premise
14 research, the writers independently email their first batch of monologue jokes to the
15 monologue writers' assistant, Danielle Weisberg. UF 17. Weisberg then compiles all
16 the writer submissions in a document called "Batch 1" and distributes a hard copy of
17 the document to the monologue writers. UF 18.

18 Around noon, the monologue writers and Weisberg meet to review Batch 1. UF
19 19. During this meeting, the monologue writers edit the jokes to fix grammatical
20 errors and make stylistic improvements. UF 20. They also remove redundant jokes
21 created by different monologue writers (a near-everyday occurrence) and jokes that
22 otherwise do not work. UF 21. Following these edits, the revised Batch 1 jokes are
23 sent to O'Brien for review. UF 22. O'Brien makes minor edits, approves jokes for the
24 monologue, and identifies topics he wants the writers to keep working on. UF 23.

25 Between 1:00 and 1:45 p.m., the writers receive O'Brien's notes on Batch 1,
26 and draft more jokes for Batch 2, focusing on the topics identified by O'Brien. UF 24.
27 Weisberg circulates additional intern premises around this time. UF 25.

28 After rehearsal (between 2:00 and 2:45 p.m.), O'Brien meets with his writers to

1 review pre-approved Batch 1 and new Batch 2 jokes, and selects which jokes to move
2 forward with. UF 26. The selected jokes are sent to *Conan*'s research department to
3 vet factual accuracy and *Conan*'s producers to vet sponsorship issues. UF 27.

4 By 3:40 p.m., the writers create a final batch of jokes for Batch 3, which is
5 again submitted for *Conan*'s review. UF 28. Batch 3 includes the previously approved
6 jokes, and new jokes the writers created since the 2:30 p.m. meeting. UF 29.

7 At 3:45 p.m., O'Brien, the monologue writers, Weisberg, O'Brien's on-air
8 "sidekick" Andy Richter, the show's head writer, Ross, and a few other staff members
9 meet to finalize the show's monologue. UF 30. Mr. O'Brien then reads all approved
10 monologue jokes off cue cards, including any from Batch 3. UF 31. The group
11 decides which of the approved jokes make it into the finalized monologue, and in
12 what order. UF 32. At this stage, previously approved jokes may still be tweaked or
13 discarded – particularly if anyone has seen or heard a similar joke done elsewhere. UF
14 33. The show begins taping at 4:30 p.m., just after this meeting ends. UF 34.

15 Each writer drafts monologue jokes from their own office, and independently
16 submits their jokes to Weisberg throughout the day. UF 35. At every stage of review,
17 the jokes are presented anonymously. UF 36. This anonymous process is by design,
18 so that the jokes are judged on their merits alone. UF 37. Because the monologue
19 jokes are written, submitted, and eventually used on the show without attribution to
20 any particular writer, the quality or quantity of the output by a particular writer is not
21 measured, and does not bear on a writer's standing at the show. UF 38.

22 C. The Jokes At Issue

23 **The Delta Joke:** On January 14, 2015, at 4:14 p.m., Kaseberg posted the
24 following "Delta Joke" on his blog: "A Delta flight this week took off from Cleveland
25 to New York with just two passengers. And they fought over control of the armrest
26 the entire flight." UF 39. Kaseberg purportedly registered this joke with the Copyright
27 Office on March 10, 2015. UF 40. [REDACTED]
28 [REDACTED]

1 [REDACTED] UF 41.

2 The *Conan* Defendants' accused Delta Joke reads as follows: "This never
3 happens anymore. This is a strange story. On Monday, a Delta flight from Cleveland
4 to New York took off with just two passengers. Two passengers on the whole plane.
5 Yet somehow, they spent the whole flight fighting over the armrest. As if they
6 wouldn't sit together, but they did. Everyone's ok." UF 42. This joke aired on January
7 14, 2015. UF 43. Importantly, the *Conan* monologue writer who created the joke,
8 Josh Comers, submitted it via email on January 14, 2015 at 11:33 a.m. UF 44. Thus,
9 the *Conan* Defendants created their Delta Joke nearly five hours before Kaseberg first
10 posted his version of the joke. Also, Kaseberg published his Delta Joke just sixteen
11 minutes before the January 14, 2015 *Conan* episode began taping, after all jokes for
12 that show were vetted and finalized. UF 33-34, 91.

13 **The Washington Monument Joke:** Kaseberg posted the following
14 "Washington Monument Joke" to Twitter on February 17, 2015 at 7:21 a.m. and to
15 his blog at 11:20 a.m.: "The Washington Monument is ten inches shorter than
16 previously thought. You know the winter has been cold when a monument suffers
17 from shrinkage." UF 45. Kaseberg's effective registration date for this joke is
18 December 11, 2015. UF 46.

19 The *Conan* Defendants' accused Washington Monument Joke reads as follows:
20 "Yesterday surveyors' announced that the Washington Monument is ten inches
21 shorter than what's been previously recorded. Yeah. Of course, the monument is
22 blaming the shrinkage on the cold weather. Penis joke." UF 47. This joke aired on
23 February 17, 2015. UF 48. Brian Kiley submitted this joke via email on February 17,
24 2015 at 1:23 p.m. UF 49.

25 Significantly, O'Brien previously told a version of the Washington Monument
26 Joke during the January 9, 2014 monologue, over a year before Kaseberg created his
27 version of the Washington Monument joke. UF 50. The premise of *Conan*'s 2014
28 Washington Monument Joke reads as follows: "The East Coast is starting to warm up.

1 That's the good news. But it got very cold there for a while, especially in Washington
 2 D.C. Record low temperatures this week. Check out this time-lapse footage of the
 3 cold front hitting the Washington Monument." Following this setup, a video clip aired
 4 depicting the Washington Monument shrinking. UF 51.

5 **The UAB Joke:** On December 2, 2014, Kaseberg posted the following "UAB
 6 Joke" on his blog: "The University of Alabama-Birmingham is shutting down its
 7 football program. To which the Oakland Raiders said; 'Wait, so you can do that?'"
 8 UF 52. Kaseberg did not produce a copyright registration for this joke. UF 53.

9 The *Conan* Defendants' accused "UAB Joke" reads: "Big news in sports.
 10 University of Alabama-Birmingham has decided to discontinue its football team.
 11 Yeah. When they heard this news, New York Jets fans said, 'Wait, can you do that?
 12 It's something you can do?'" UF 54. This joke aired on *Conan* on December 3, 2014.
 13 UF 55. Kiley submitted this joke via email on December 3, 2014 at 11:32 a.m. UF 56.
 14 Notably, O'Brien has used a variation of the punchline, "Wait, you can do that?" in
 15 his monologues for years. UF 57. Since 2013, various *Conan* monologue writers
 16 submitted over twenty-five jokes with some variation of this punchline. UF 58.

17 **The Tom Brady Joke:** Kaseberg posted the following "Tom Brady Joke" to
 18 Twitter on February 3, 2015 at 8:49 a.m., and to his blog at 9:02 a.m.: "Tom Brady
 19 said he wants to give his MVP truck to the man who won the game for the Patriots.
 20 So enjoy that truck, Pete Carroll." UF 59. Kaseberg did not produce a copyright
 21 registration for this joke. UF 60.

22 The *Conan* Defendants' accused Tom Brady Joke reads as follows: "Tom
 23 Brady said he wants to give the truck that he was given as Super Bowl MVP, give the
 24 truck to the guy who won the Super Bowl for the Patriots. Which is very nice. I think
 25 that's nice. I do. Yes. So Brady's giving his truck to Seahawks coach Pete Carroll."
 26 UF 61. This joke aired on *Conan* on February 4, 2015. UF 62. Kiley submitted this
 27 joke via email on February 3, 2014 at 3:14 p.m. UF 63.

28 **The Bruce Jenner Joke:** Kaseberg posted the following "Bruce Jenner Joke"

1 to his blog on June 9, 2015 at 11:05 a.m. and to Twitter at 11:31 a.m.: “Three towns,
2 two in Texas, one in Tennessee, have streets named after Bruce Jenner and now they
3 have to consider changing them to Caitlyn. And one will have to change from a Cul-
4 De-Sac to a Cul-De-Sackless.” UF 64. Kaseberg’s effective registration dates for this
5 joke are June 26, 2015 and September 8, 2015. UF 65.

6 The *Conan* Defendants’ accused Bruce Jenner Joke reads as follows: “Some
7 cities that have streets named after Bruce Jenner are trying to change the streets’
8 names to Caitlyn Jenner. If you live on Bruce Jenner cul-de-sac it will now be cul-de-
9 no-sack.” UF 66. This joke aired on *Conan* on June 9, 2015. UF 67. Rob Kutner
10 submitted this joke via email on June 9, 2015 at 1:34 p.m. UF 68.

11 **D. Kaseberg’s Joke Theft Accusation**

12 [REDACTED]
13 UF 69. In fact, he wrote about his desire to work at *Conan* as early as 2010. UF 70.

14 [REDACTED]
15 [REDACTED] UF 71. [REDACTED]

16 [REDACTED] UF 72. [REDACTED]

17 [REDACTED]
18 [REDACTED] UF 73. [REDACTED]

19 [REDACTED] UF 74.

20 Relevant to this lawsuit, Kaseberg purportedly started noticing similarities
21 between his jokes and the *Conan* Defendants’ jokes when the Delta Joke aired. UF
22 75. After *Conan*’s Delta Joke aired, he tweeted at Defendant Sweeney saying: “95%
23 sure [he] had a joke from [his] blog used on the show. I’m not upset, [but] would like
24 the opportunity to contribute jokes.” UF 76. Three days after the Tom Brady Joke
25 aired, Kaseberg tweeted at one of *Conan*’s sketch writers that the “Brady joke was on
26 my blog on Feb. 3 and on the monologue on Feb. 4. Any chance I can send jokes on
27 my own as a freelancer?” UF 77.

28 Then, after seeing the *Conan* Defendants’ Washington Monument Joke on

1 *Conan*, Kaseberg began calling the show about the alleged similarities, and eventually
 2 reached Sweeney. UF 78. During this call, Kaseberg *again* expressed an interest in
 3 working for *Conan* in some capacity. Sweeney rejected Kaseberg's request for work.
 4 UF 79. Following the call, Kaseberg again tweeted at Sweeney, saying "Thanks for
 5 taking my call. Last thing I wanted was to sound accusing. If there is any way I can
 6 contribute jokes, let me know." UF 80. Approximately five months after that tweet,
 7 Kaseberg filed this lawsuit accusing *Conan* of stealing four of his jokes. UF 81. [REDACTED]
 8 [REDACTED]
 9 [REDACTED] UF 82.

10 **III. LEGAL STANDARD**

11 A moving party is entitled to summary judgment when the evidence, viewed in
 12 the light most favorable to the nonmoving party, demonstrates a lack of any genuine
 13 issue as to any material fact. *Tarin v. Cnty. of Los Angeles*, 123 F.3d 1259, 1263 (9th
 14 Cir. 1997). A court may grant summary adjudication as to certain facts, issues, or
 15 applicable legal theories, deeming them established for trial. *Mory v. City of Chula*
 16 *Vista*, 2010 WL 3748813, at *2 (S.D. Cal. Sept. 24, 2010). The movant bears the
 17 burden of establishing the absence of a genuine issue of material fact. *Celotex Corp.*
 18 *v. Catrett*, 477 U.S. 317, 323-24 (1986). That burden may be met by showing that
 19 there is an absence of evidence to support the nonmovant's case. *Id.* at 325. Once the
 20 movant has met its initial burden, the non-moving party must go beyond the pleadings
 21 and identify specific facts that show a genuine issue for trial. *See id.* at 323-34. Only
 22 genuine, material disputes will properly preclude the entry of summary judgment.
 23 *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

24 **IV. ARGUMENT**

25 **A. Kaseberg Failed To Register The Tom Brady And UAB Jokes,** 26 **Which Is A Fundamental Prerequisite To Filing Suit**

27 A party cannot maintain an infringement action "until preregistration or
 28 registration of the copyright claim has been made . . ." 17 U.S.C. § 411(a). Ninth

Circuit law is clear that a plaintiff cannot litigate an infringement claim until it has at least filed an application to register the allegedly infringed copyrights. *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 619-21 (9th Cir. 2010). It is the plaintiff's burden to demonstrate compliance with the Copyright Act's formalities, including proper registration. *See Olander Enters., Inc., v. Spencer Gifts, LLC*, 812 F. Supp. 2d 1070, 1075 (C.D. Cal. 2011).

Kaseberg cannot prove that he registered, or even attempted to register, the Tom Brady or UAB Jokes. In fact, Defendant Conaco, LLC requested "all documents relating to the application and/or registration of the JOKES AT ISSUE with the United States Copyright Office." UF 83. In response, Kaseberg agreed to produce all responsive, non-privileged documents in his possession without objection. UF 84. Kaseberg then produced uncertified copies of four registration certificates. UF 85. Those registrations covered: (1) "[t]ext of seven (7) jokes published on January 14, 2015," which corresponds to his Delta Joke's publication date, (2) "[s]ingle joke written and posted on Blog on June 9, 2015 re: Cul-De-Sac," which corresponds to his Bruce Jenner Joke, (3) "[t]ext of five (5) jokes posted on June 9, 2015 at 11:05 am," which also corresponds to his Bruce Jenner Joke, and (4) "[t]ext of single joke published on February 17, 2015," which corresponds to his Washington Monument Joke's publication date. *Id.*; UF 86.

Significantly, Kaseberg failed to produce any evidence proving that he registered the Tom Brady and UAB Jokes, which were first published on February 3, 2015 and December 3, 2014, respectively. The Copyright Office's records are consistent with Kaseberg's production. UF 87. Thus, Kaseberg's claims as to the Tom Brady and UAB Jokes must be dismissed for lack of standing.

B. Kaseberg Cannot Prove Copyright Infringement

To prove copyright infringement, a plaintiff must show that the defendant copied protected elements of an original work. *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F.3d 1072, 1076 (9th Cir. 2006). Copying can be established

1 through evidence of direct copying, or by showing that the defendant had “access” to
 2 the copyrighted material and that the works at issue are “substantially similar.” *Id.*
 3 Kaseberg cannot prove that any copying occurred in this case.

4 **1. Kaseberg Lacks Any Evidence Of Direct Copying**

5 *Conan*’s monologue writers all emphatically deny copying Kaseberg’s jokes.

6 UF 88. [REDACTED]

7 [REDACTED]
 8 [REDACTED] UF 89. [REDACTED]

9 [REDACTED] UF

10 90. As such, Kaseberg cannot prove direct copying.

11 **2. Kaseberg Cannot Establish Access**

12 **a. The Conan Defendants Created The Delta And**
 13 **Washington Monument Jokes First**

14 As a matter of law and logic, a defendant cannot have access to a plaintiff’s
 15 copyrighted work where the defendant created the accused work first. *See Payne v.*
 16 *Anvil Knitwear, Inc.*, 2007 WL 1953438, at *2-3 (C.D. Cal. June 27, 2007) (“As a
 17 matter of law, Anvil did not have ‘access’ to Plaintiff’s copyrights because Anvil
 18 Undated Designs were undisputedly created before Plaintiff’s copyrights . . .”), *aff’d*,
 19 293 F. App’x 475 (9th Cir. 2008).

20 Here, Kaseberg’s Delta Joke was first posted on January 14, 2015 at 4:14 p.m.
 21 UF 91. But the *Conan* Defendants’ Delta Joke was emailed to Weisberg on January
 22 14, 2015 at 11:33 a.m., *nearly five hours before Kaseberg published his joke*. UF 44.

23 Similarly, Kaseberg first published his Washington Monument Joke on
 24 February 17, 2015. UF 92. Yet, *Conan* aired a joke about the Washington Monument,
 25 which had the same concept and punchline as Kaseberg’s joke, *over a year before*
 26 *Kaseberg’s first publication date*. UF 50. Thus, Defendants lacked access to
 27 Kaseberg’s Delta Joke and Washington Monument Joke as a matter of law.
 28

b. Kaseberg Lacks Any Significant, Affirmative, And
Probative Evidence To Establish Access

In cases lacking evidence of direct copying, such as this one, circumstantial evidence can be used to prove access by (1) establishing a chain of events linking the plaintiff's work and the defendant's access, or (2) showing that the plaintiff's work has been widely disseminated. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000). Access, however, "may not be inferred through mere speculation or conjecture." *Id.* Instead, it must be proven by showing that the defendant had a "reasonable opportunity" to view the plaintiff's work. *Id.* "[S]ignificant, affirmative, and probative evidence" is required to prove access. *Bernal v. Paradigm Talent and Literary Agency*, 788 F. Supp. 2d 1043, 1054 (C.D. Cal. 2010).

[REDACTED]
 [REDACTED]
 [REDACTED] UF 93. But that type of speculative assertion is woefully insufficient to establish the requisite chain of events. *See Meta-Film Assoc., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984) (finding that "bare possibility" of access is insufficient to avoid summary judgment on a copyright infringement claim).

Moreover, courts have consistently held that a plaintiff cannot establish the requisite chain of events where the work is merely displayed on the Internet, and there is no direct evidence that a defendant actually visited the website. *See, e.g., Bldg. Graphics, Inc. v. Lennar Corp.*, 708 F.3d 573, 580 (4th Cir. 2013) (finding that mere existence of a copyrighted work online is insufficient to support an inference that the work fell into the defendant's hands); *Chafir v. Carey*, 2007 WL 2702211, at *3 (S.D.N.Y. Sept. 17, 2007) ("[T]he fact that Plaintiff's Song was available on a publicly accessibly [sic] website does not prove access, because there is no evidence that Defendants actually visited the website on which Plaintiff's Song was posted.").

Here, *three* different monologue writers initially created the *Conan* Defendants'

1 accused jokes. Yet, all three testified that they have never visited Kaseberg's blog or
2 Twitter page. UF 94. [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 [REDACTED] UF 90. Kaseberg also failed to produce any evidence (*e.g.*, records reflecting
6 "hits" to his website, list of accounts that follow his Twitter page, metatags used to
7 attract viewers to his websites, etc.) that could link the *Conan* Defendants to
8 Kaseberg's jokes. Accordingly, Kaseberg's general online presence is insufficient to
9 establish a chain of events linking Kaseberg and Defendants.

10 Kaseberg also cannot establish that his jokes were widely disseminated. In fact,
11 Kaseberg's only "evidence" of widespread dissemination is that "[a]nyone, including
12 defendants and employees of defendants may access his content using a web
13 browser." UF 95. But merely having an online presence is insufficient to establish
14 widespread dissemination. *See, e.g., Art Attacks Ink, LLC v. MGA Entm't, Inc.*, 581
15 F.3d 1138, 1144 (9th Cir. 2009) (recognizing that while the Internet can reach a wide
16 audience, there must be evidence to demonstrate wide dissemination); *Stabile v. Paul*
17 *Smith Ltd.*, 137 F. Supp. 3d 1173, 1187 (C.D. Cal. 2015) (finding that "simply
18 displaying an image on [plaintiff's] website for an undeterminable period of time is
19 insufficient to demonstrate that it was widely disseminated").

20 Further, "the public dissemination necessary to infer that a defendant might
21 have had access to the work is considerable." *Loomis v. Cornisch*, 2013 WL 6044345,
22 at *10 (C.D. Cal. Nov. 13, 2013). Again, Kaseberg failed to produce *any* evidence
23 (*e.g.*, records reflecting hits to his website) to establish that his blog or Twitter are
24 widely disseminated. In fact, to the extent any information concerning Kaseberg's
25 online reach can be gleaned from Kaseberg's evidence, such information cuts against
26 a finding of widespread dissemination. For example, the three asserted jokes he
27 posted to Twitter all show very little engagement, if any. Specifically, the Tom Brady
28 Joke received no more than two likes and zero retweets, and the Washington

1 Monument Joke and the Bruce Jenner Joke received no likes or retweets, at the time
 2 of the alleged infringement. UF 96. Such marginal reach dispels any realistic notion
 3 that dissemination of Kaseberg's jokes was considerable.

4 Summary judgment should be entered in Defendants' favor based on the issue
 5 of access alone.

6 **3. Kaseberg's Copyright Is "Thin" And He Cannot Establish The**
 7 **Jokes At Issue Are Virtually Identical**

8 To determine substantial similarity, the Ninth Circuit applies a two-part test
 9 consisting of extrinsic and intrinsic components. *Rice v. Fox Broad. Co.*, 330 F.3d
 10 1170, 1174-75 (9th Cir. 2003). For summary judgment, only the extrinsic test is
 11 relevant. *Id.* at 1174. The extrinsic test involves an objective comparison of the
 12 articulable similarities between two works. *Id.* It is the plaintiff's burden to identify
 13 the protectable elements of the copyrighted work that allegedly are copied. *Apple*
 14 *Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994). Only
 15 protected expression is relevant for purposes of assessing substantial similarity. *Shaw*
 16 *v. Lindheim*, 919 F.2d 1353, 1361 (9th Cir. 1990). Thus, "[s]ubstantial similarity"
 17 refers to similarity of expression, not merely similarity of ideas or concepts." *Dr.*
 18 *Seuss Enter., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1398 (9th Cir. 1997).

19 Further, in applying the extrinsic test, courts must use "analytic dissection to
 20 determine the scope of copyright protection before works are considered 'as a
 21 whole.'" *Id.* Thus, "when applying the extrinsic test, a court must filter out and
 22 disregard the non-protectable elements in making its substantial similarity
 23 determination." *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002).

24 "[T]he court must then apply the relevant limiting doctrines in the context of
 25 the particular medium involved, through the eyes of the ordinary consumer of that
 26 product." *Apple Computer*, 35 F.3d at 1443. Finally, "[h]aving dissected the alleged
 27 similarities and considered the range of possible expression, the court must define the
 28 scope of the plaintiff's copyright – that is, decide whether the work is entitled to

1 ‘broad’ or ‘thin’ protection.” *Id.* The scope of protection sets the appropriate standard
 2 for a subjective comparison of the works as a whole to determine whether they are
 3 sufficiently similar. *Id.* “Where a copyrighted work is composed largely of
 4 unprotectable elements . . . it receives thin rather than a broad scope of protection.”
 5 *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1178 (C.D. Cal. 2001) (internal
 6 citations and quotations omitted). A “thin” copyright only protects against virtually
 7 identical copying. *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003).

8 **a. Kaseberg’s Jokes Only Warrant “Thin” Protection**

9 Kaseberg’s monologue-style jokes are undeniably composed largely of
 10 unprotectable elements, and thus, are only entitled to thin copyright protection.

11 Kaseberg’s setups are derived entirely from current events and news stories,
 12 and it is axiomatic that current events and news stories are not copyrightable. *Feist*
 13 *Publ’n, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991). [REDACTED]

14 [REDACTED]
 15 [REDACTED] UF 97. Kaseberg’s punchlines, as with jokes in general, convey *ideas*.
 16 Yet, ideas are not copyrightable. *Shaw*, 919 F.2d at 1356 (“ideas within a work are
 17 not protected”). Indeed, as stated in the leading treatise on copyright law, jokes are
 18 unlikely to contain significant original (*i.e.*, protectable) expression as compared to
 19 other copyrightable works “given how many arise out of ‘stock situations.’” Melville
 20 B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.13 (Mathew Bender rev. ed.
 21 2016). Nimmer further states that “as the value of a joke often inheres in its idea
 22 rather than its particular expression, this limitation may act more severely here than in
 23 other copyright domains.” *Id.* Nimmer’s statements regarding the copyrightability of
 24 jokes rings especially true here. Unlike many other types of jokes, Kaseberg’s jokes
 25 rely exclusively on ideas, not expression, to derive the desired humor. Thus,
 26 Kaseberg’s punchlines are inherently composed of unprotectable elements.

27 Moreover, the possibilities of expressing a particular (unprotectable) idea
 28 which flows from the same (unprotectable) factual premise in a short, single sentence

1 punchline is necessarily limited. This too warrants application of the “virtual identity”
 2 standard of analysis. *Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d 904, 914 (9th Cir.
 3 Cal. 2010) (“If there's only a narrow range of expression ... then copyright protection
 4 is ‘thin’ and a work must be ‘virtually identical to infringe.’”).

5 Even assuming that some expressive elements remain after filtering out the
 6 underlying ideas from Kaseberg’s punchlines, those expressive elements still barely
 7 qualify for copyright protection, if at all. Significantly, Kaseberg wrote his punchlines
 8 using commonly-used expressions, and “[o]rdinary phrases are not entitled to
 9 copyright protection.” *Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989). For
 10 example, the punchline for Kaseberg’s Delta Joke is “[a]nd they wrestled for control
 11 of the armrest the entire flight.” That expression conveys the underlying, unoriginal
 12 idea – that two people fought for control of an armrest – in a completely unoriginal
 13 and stereotypical fashion. And that ordinary phrase, when focusing on the expression
 14 (as opposed to the underlying idea), is, at best, only entitled to minimal copyright
 15 protection. Otherwise, Kaseberg would effectively have a monopoly as to the joke
 16 (*i.e.*, the idea) itself, which would be improper. *See Foxworthy v. Custom Tees, Inc.*,
 17 879 F. Supp. 1200, 1219 (N.D. Ga. 1995) (“two entertainers can tell the same joke,
 18 but neither entertainer can use the other’s combination of words”). The same
 19 conclusion can be reached as to Kaseberg’s other punchlines, which similarly employ
 20 unoriginal, commonly-used expressions, as demonstrated below. As such, the
 21 punchlines are, at best, only entitled to minimal copyright protection.

22 Accordingly, to the extent that Kaseberg’s jokes are entitled to any copyright
 23 protection, such protection is “thin.”

24 **b. Stripped of Non-Protectable Elements, The Expression**
 25 **In The Parties’ Jokes Are Not Virtually Identical**

26 Defendants concede that at first blush, the jokes appear similar. But in an
 27 infringement context, the analysis compares only the protectable aspects of an
 28 allegedly infringed work. *Apple Computer*, 35 F.3d at 1435 (“Only those elements of

1 a work that are protectable ... can be compared); *see also Funky Films*, 462 F.3d at
 2 1077 (courts only look to whether “protectable elements, standing alone, are
 3 substantially similar”) (internal citations omitted). When unprotectable elements are
 4 excluded, as they must be, Kaseberg cannot establish that his jokes are virtually
 5 identical. Indeed, a careful comparison of the jokes demonstrates that any similarities
 6 are limited to unprotectable ideas and unoriginal comedic conventions, which cannot
 7 give rise to infringement. *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 208 (9th
 8 Cir. 1988) (“[T]o the extent the similarities between plaintiff’s and defendant’s works
 9 are confined to ideas and general concepts, these similarities are noninfringing.”). In
 10 contrast, substantial differences exist as to the *particular expression* of the jokes.

11 Among other distinguishing factors in the expression, the parties’ jokes are
 12 worded differently, convey different actions, contain different levels of information,
 13 and involve different perspectives. Moreover, the structure of the jokes are different
 14 in large part because the jokes were intended to be delivered to their respective
 15 audiences in different mediums. In particular, Kaseberg wrote and published his jokes
 16 to be read online. As such, Kaseberg’s jokes follow the same, two-sentence, setup-
 17 punchline format, which is concisely digestible to a passive, solitary audience. In
 18 contrast, the *Conan* Defendants’ jokes are performed on stage by O’Brien, delivered
 19 to an audience. The *Conan* monologue writers craft the jokes with that distinction in
 20 mind. Thus, the structure and delivery of the jokes are more conversational in nature
 21 and often include improvised or ad-libbed language based on the audience’s reaction.
 22 The *Conan* Defendants’ jokes are structured such that the jokes will get the biggest
 23 laugh from the studio audience in the moment. Further, millions of people have a
 24 familiarity with O’Brien, and the writers take care to craft jokes that are consistent
 25 with his voice and his brand. Specific examples of these various distinguishing factors
 26 as to the protectable expression in the jokes at issue are presented below.

27 **The Delta Joke:** O’Brien sets up the *Conan* Defendants’ Delta Joke with the
 28 following language before the premise: “This never happens anymore. This is a

1 strange story.” Conversely, Kaseberg’s Delta Joke immediately jumps into the
 2 premise (which he copied from the *Conan* Defendants). Kaseberg’s Delta Joke further
 3 states that the passengers “wrestled for control” of the armrest “the entire flight.” In
 4 contrast, the *Conan* Defendants’ joke says that passengers spent the “whole flight
 5 fighting over the armrest.” Thus, the parties’ jokes used different expressive language
 6 (“wrestle” vs. “fight” and “entire” vs. “whole”), where the *Conan* Defendants’
 7 punchline is structured in an inverse manner as compared to Kaseberg’s punchline.

8 Also, the fact that the *Conan* Defendants’ joke ended with the word “armrest”
 9 is significant. They deliberately ended the joke with the word “armrest” to prevent
 10 running over the humor in the punchline with additional words. UF 98. [REDACTED]

11 [REDACTED]
 12 [REDACTED] UF 99. [REDACTED]

13 [REDACTED] UF 100. Of course, one joke cannot be better than another if
 14 the jokes are virtually identical. The parties’ jokes are also distinguishable because
 15 O’Brien followed the joke’s premise with “Two passengers on the whole plane”
 16 before seguing to his punchline, whereas Kaseberg’s joke contains no such transition.

17 **The Tom Brady Joke:** the *Conan* Defendants’ Tom Brady Joke makes two
 18 references to “Super Bowl” in the setup alone. Kaseberg’s Tom Brady Joke fails to
 19 use the term “Super Bowl” at all. Instead, it makes a single reference to the “game.”
 20 the *Conan* Defendants’ setup also makes clear that Tom Brady was given the truck for
 21 earning the honor of Super Bowl MVP. Kaseberg’s joke mentions the “MVP truck”
 22 with no reference to the Super Bowl, or how the truck was Brady’s to give away.

23 O’Brien elaborates on the joke’s setup by twice mentioning how nice it is for
 24 Tom Brady to give the truck away. Kaseberg’s joke contains no similar reference or
 25 segue. O’Brien responds to the audience’s reaction midstream (saying “I do” and
 26 “yes”) before delivering the punchline. Kaseberg’s joke has no such language.

27 Moreover, Kaseberg’s punchline reads “enjoy the truck Pete Carroll.” In
 28 contrast, the *Conan* Defendants’ punchline reads “So, Brady is giving his truck to

1 Seahawks coach Peter Carroll.” the *Conan* Defendants’ Tom Brady Joke specifically
 2 identifies Pete Carroll as the Seahawks coach. Kaseberg’s does not. Kaseberg’s Tom
 3 Brady Joke also sarcastically tells Pete Carroll to “enjoy” the truck, whereas the
 4 *Conan* Defendants’ joke is expressed in a more neutral tone. Finally, in Kaseberg’s
 5 Tom Brady Joke, the audience must infer that the truck was given to Pete Carroll. The
 6 *Conan* Defendants’ joke explicitly says Tom Brady gave the truck to Pete Carroll.

7 **The Washington Monument Joke:** Kaseberg’s setup reads: “The Washington
 8 Monument is ten inches shorter than previously thought.” Notably, this exact phrasing
 9 was used in a tweet by Jimmy Fallon *the day before Kaseberg’s publication*. UF 115.
 10 Conversely, the *Conan* Defendants’ premise reads: “Yesterday, surveyors announced
 11 that the Washington Monument is ten inches shorter than what’s been recorded.” This
 12 phrasing offers more specific information – *e.g.*, when and how it was discovered the
 13 monument was shorter, and who made the discovery. Kaseberg’s setup does not offer
 14 any of these details. The setups are further distinguishable, as the *Conan* Defendants’
 15 joke makes clear the monument is shorter than what had been “previously *recorded*,”
 16 while Kaseberg uses the language “previously *thought*.” In the middle of the *Conan*
 17 Defendants’ joke, O’Brien again inserts a “yeah.” Kaseberg’s joke does not.

18 The *Conan* Defendants’ punchline anthropomorphizes the Washington
 19 Monument, suggesting that the monument itself blamed the “shrinkage” on the cold
 20 weather. In contrast, Kaseberg’s joke presents the punchline from an outside
 21 perspective, stating that, “You know the winter has been cold when a monument
 22 suffers from shrinkage.” Beyond the objective differences in the wording of the
 23 punchlines, the punchlines are suggesting different things. In saying that the
 24 monument blamed the colder weather for the “shrinkage,” the *Conan* Defendants’
 25 joke suggests that the other factors could be to blame. In contrast, Kaseberg’s joke
 26 explicitly provides that the shrinkage is indeed the result of cold weather. Kaseberg’s
 27 joke mentions the winter has been cold, where the *Conan* Defendants’ references the
 28 cold weather – untethered to any season. Finally, O’Brien concludes his joke noting it

1 was a “penis joke.” Kaseberg ends his joke with the shrinkage punchline.

2 **The Bruce Jenner Joke:** Kaseberg’s premise specifically identifies *three*
 3 towns which have streets named after Bruce Jenner. In contrast, the *Conan*
 4 Defendants’ setup only mentions that “some cities have streets named after Bruce
 5 Jenner.” Kaseberg’s joke says the towns “*have to consider changing* the name to
 6 Caitlyn.” The *Conan* Defendants’ joke says that cities are actively “*trying to change*
 7 the streets’ name to Caitlyn *Jenner*” – including “Jenner” where Kaseberg did not.

8 Further, Kaseberg’s punchline states that one street will “have to change from a
 9 Cul-De-Sac to a *Cul-de-Sacless*.” The *Conan* Defendants’ joke says that “*Bruce*
 10 *Jenner Cul-De-Sac . . . will be now cul-de-no-sac*” – ending the joke on the hard “k”
 11 sound. Moreover, the *Conan* Defendants’ joke is directed to residents of the street,
 12 specifically introducing the punchline with the phrase “If you live on Bruce Jenner
 13 Cul-de-Sac...” Kaseberg’s joke has no such preamble to his punchline.

14 **The UAB Joke:** O’Brien introduces the joke by stating “Big news in sports.”
 15 Kaseberg’s joke contains no lead-in. Once O’Brien transitions into the factual setup
 16 of his joke, he focuses on the fact that the “University of Alabama-Birmingham *has*
 17 *decided to discontinue* its football *team*.” Kaseberg begins his joke by stating, “The
 18 University of Alabama-Birmingham *is shutting down* its football *program*.” O’Brien
 19 presents the joke in the passive voice, using the term “discontinue,” while Kaseberg
 20 presents the setup in the active voice, and uses the phrase “shutting down.” In
 21 between the setup and punchline, O’Brien again acknowledges the audience (“yeah”).
 22 Kaseberg’s joke has no such transition from the setup to the punchline.

23 Regarding the punchlines, the expressions are vastly different. Kaseberg’s
 24 punchline reads, “To which the Oakland Raiders said; ‘Wait, so you can do that?’”
 25 Alternatively, O’Brien states: “When they heard the news, New York Jets’ fans said,
 26 wait, can you do that?” The differences here are significant. First, the jokes implicate
 27 two different football teams – the Oakland Raiders and the New York Jets. Second,
 28 the *Conan* Defendants’ Joke quotes Jets *fans*, while Kaseberg’s quote is offered by the

1 Raiders' football *team* itself. Further, in Kaseberg's joke, the Raiders organization
 2 asks "*you can* do that?," while the *Conan* Defendants' joke is worded so that Jets'
 3 fans ask "*can you* do that?" [REDACTED]

4 [REDACTED] UF 101. [REDACTED]

5 [REDACTED] UF 102. This leaves no
 6 similar, protectable elements in the punchline to distinguish. Finally, O'Brien expands
 7 on the punchline ("Is that something you can do?") whereas Kaseberg does not.

8 Overall, no reasonable juror could conclude that any protected expression in the
 9 parties' jokes is virtually identical. As such, summary judgment of noninfringement
 10 should be granted in Defendants' favor.

11 **C. The *Conan* Defendants' Independently Created The Jokes At Issue**

12 Defendants are also entitled to summary judgment if their jokes were
 13 independently created. *See Granite Music Corp. v. United Artist Corp.*, 532 F.2d 718,
 14 720 (9th Cir. 1976) (holding that proof of independent creation rebuts a claim of
 15 copyright infringement). The evidence presented in this case firmly establishes that
 16 the *Conan* Defendants' jokes were independently created.

17 *First*, as explained above, the *Conan* Defendants created the Delta and
 18 Washington Monument Jokes before Kaseberg's initial publication. *See supra* at
 19 IV(B)(2)(a). That fact alone is sufficient to establish that Defendants independently
 20 created these two jokes. *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1128 (9th Cir. 2002)
 21 ("By simple logic, it is impossible to *copy* something that does not exist.").

22 *Second*, evidence relating to the creation the its accused jokes also conclusively
 23 establishes they were independently created by the *Conan* Defendants. For example,
 24 the three monologue writers that created the accused jokes all declared, under penalty
 25 of perjury, that they did not copy Kaseberg's jokes. UF 88. None of them had ever
 26 heard of Kaseberg, visited Kaseberg's blog or twitter page, or seen any of Kaseberg's
 27 jokes at issue prior to the alleged infringement. UF 94. And despite taking eleven
 28 depositions, none of Defendants' witnesses testified to having even heard of

1 Kaseberg, much less viewing his blog, twitter page, or the jokes at issue, prior to
 2 learning about Kaseberg's accusations. UF 103. Moreover, all communications
 3 between Comers, Kiley, Kutner, and Weisberg for the days at issue were produced.
 4 UF 104. None of those communications mention Kaseberg or his material. *Id.*

5 Additionally, the three monologue writers that created the *Conan* Defendants'
 6 jokes do not perform general online searches, look at other comics' materials, or visit
 7 social media to perform their premise research. UF 105. Their limited research is
 8 restricted to a handful of specific news outlets they prefer, and is solely to gather
 9 factual premises – not to gain inspiration for punchlines. UF 106. This makes it
 10 virtually impossible for any writer, much less three separate writers, to have
 11 independently stumbled onto Kaseberg's jokes for source material – especially given
 12 the limited reach of his posts and the non-existent awareness of his platforms.

13 Even assuming that *Conan*'s writers all independently reviewed Kaseberg's
 14 jokes online, they still would have absolutely no incentive to copy those jokes given
 15 *Conan*'s submission protocol. There is no requirement that a writer submit a
 16 minimum number of jokes for the monologue each day. UF 107. Nor is there any
 17 requirement that a show's monologue must feature a certain number of jokes. UF 108.
 18 Monologue jokes are reviewed anonymously. UF 37. There is no attribution as to
 19 individual monologue jokes, and the show does not keep track of a particular
 20 monologue writer's submissions. UF 38. Because of this process, the monologue
 21 submissions of any writer do not, and could not, factor in to their standing at the show
 22 – including decisions regarding retention, termination, or compensation. *Id.*

23 In contrast, *Conan*'s monologue writers have good reason to deliberately avoid
 24 copying material. O'Brien, Sweeney, Comers, Kutner and Kiley all testified that
 25 stealing jokes is an unacceptable practice. UF 109. Consistent with this view, *Conan*
 26 has an informal policy in place where monologue jokes will be pulled if it is ever
 27 discovered that they are similar to a joke told by anyone else, even if the similarity is
 28 purely coincidental. UF 110. As such, it simply does not follow that O'Brien, or his

1 writers, would risk their reputations, and potentially their careers, to search out and
2 copy Kaseberg's jokes for use on the show.

3 The time-intensive, highly structured process of developing *Conan's*
4 monologue further supports a determination that the *Conan* Defendants independently
5 created the accused jokes. On a typical day, the writers spend a maximum of 90
6 minutes researching premises, but submit at least 30 jokes. UF 111. Between the
7 meetings they attend, and the time it takes to write the approximately 30-plus jokes
8 each writer submits, the writers simply do not have the time to check on comedy
9 writers' online platforms, or scour the internet for monologue-style jokes to steal.

10 In addition to time constraints, the *Conan* Defendants' jokes are informed by
11 other characteristics of the monologue development process. For example, the
12 Washington Monument joke spawned from an intern premise circulated the afternoon
13 the joke aired. UF 112. Notably, the intern pulled the premise from a Huffington Post
14 Article, not from Kaseberg. *Id.* Moreover, the UAB's joke's punchline, "Wait, can
15 you do that?" is a catch phrase used by O'Brien in his punchlines countless times over
16 the years. UF 57. Indeed, *Conan's* monologue writers submitted some variation of the
17 punchline numerous times with various factual setups. UF 58. This is further indicia
18 of the *Conan* Defendants' independent creation.

19 *Third*, any similarities between the parties' jokes are attributable to the nature
20 of the jokes themselves. Because premises to monologue-style jokes derive from
21 current events and news stories, countless people (*e.g.*, other late-night hosts,
22 individuals on social media, etc.) are all creating jokes derived from the same starting
23 point. As such, it is inevitable that multiple parties will, at times, also arrive at the
24 same end point to a joke, independent of one another. [REDACTED]

25 [REDACTED]
26 [REDACTED] UF 113.

27 The jokes at issue in this case are particularly susceptible to overlap due to
28 parallel thought. Indeed, at least six different people posted jokes similar to the Tom

1 Brady Joke, UF 114; 17 different people posted jokes similar to the Washington
 2 Monument Joke, UF 115; four different people posted jokes similar to the Bruce
 3 Jenner Joke, UF 116; and two different people posted jokes similar to the UAB Joke,
 4 UF 117 – all *before* Kaseberg’s publications. And the similarities were not trivial.

5 For example, in response to a tweet reporting that Tom Brady wants to give his
 6 truck to Patriots teammate Malcom Butler, a Twitter user joked, “Why not Pete
 7 Carroll?” UF 118. Another Twitter user wrote, “The Washington Monument has been
 8 found to be 10 feet shorter than originally measured. I blame the cold weather for the
 9 shrinkage.” UF 119. Another person tweeted an article about whether Bruce Jenner
 10 Lane in Austin should change its name and joked, “Not if it’s a cul-de-sac.” UF 120.
 11 Finally, one Twitter user posted: “So UAB is shutting their football program down.
 12 Can the Titans do that?!?” UF 121. These examples demonstrate the prevalence of
 13 parallel thought as to the jokes at issue here.

14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED] UF 122. Boosler
 17 acknowledged that the topics at issue here lend themselves to parallel thought, as they
 18 were derived from noteworthy current events. UF 123. She also noted that Kaseberg’s
 19 punchlines were not particularly unique. UF 124. Given this, she testified that overlap
 20 among the jokes at issue could be attributable to parallel thought. UF 125.

21 Beyond the jokes at issue in this action, the *Conan* Defendants produced twelve
 22 additional examples of parallel thought occurring between *Conan* and Kaseberg. UF
 23 126. In each of these instances *Conan*’s joke was created first. *Id.* Assuming Kaseberg
 24 did not copy these jokes, these examples further demonstrate that similarities among
 25 jokes by Kaseberg and the *Conan* Defendants are a result of parallel thought, as
 26 opposed to deliberate copying. Notably, when confronted with these examples at
 27 deposition, Boosler was unable to provide any alternative explanation for the overlap
 28 beyond the existence of parallel thought, or independent creation. UF 125.

1 In addition to the parties' jokes' styles, overlap between their jokes can also be
 2 attributed to Kaseberg's repeated, deliberate efforts to imitate the monologue jokes
 3 featured in late-night shows, including *Conan*. [REDACTED]

4 [REDACTED] UF 41. [REDACTED]

5 [REDACTED]
 6 [REDACTED] UF 9, UF 73. [REDACTED]

7 [REDACTED]
 8 [REDACTED] UF 72. Given all this, it is unsurprising that
 9 sporadic instances of overlap occurred between the parties. Indeed, the only surprise
 10 is that, given these circumstances, Kaseberg would accuse the *Conan* Defendants of
 11 stealing his jokes, which has been refuted by all evidence in this case.

12 Finally, taking a broader look at this issue, it is evident that parallel thought is
 13 an innate reality in the world of late-night talk shows and monologue jokes. Indeed,
 14 *Conan's* writers testified (and declared under penalty of perjury) to this being a
 15 frequent occurrence among their own staff, and to having personal experience with it
 16 happening among other shows. UF 127. Indeed, a fairly recent example of this can be
 17 seen in the monologues of *Late Night with Seth Meyers* and *The Late Show with*
 18 *James Corden*. During her presidential campaign, Hillary Clinton referred to Donald
 19 Trump supporters as a "basket of deplorables." Latching onto this current event, both
 20 Myers and Corden joked during their monologues that "basket of deplorables" sounds
 21 like a product offered by KFC. UF 128. On top of that, several people on Twitter
 22 made the same observation, on the same premise, before either show aired. UF 129.
 23 This serves to show that newsworthy events – like those that serve as the premises for
 24 the jokes at issue – inherently result in parallel thought, both across late night shows,
 25 and between late-night shows and social media users.

26 In sum, substantial and compelling evidence exists to justify summary
 27 judgment based on independent creation in this case.
 28

D. Defendants Did Not Willfully Infringe Kaseberg's Copyrights

The Copyright Act provides an additional remedy if the plaintiff can show that the violation was willful. *See* 17 U.S.C. § 504(c)(2). To prove willfulness, “the plaintiff must show (1) that the defendant was actually aware of the infringing activity, or (2) that the defendant’s actions were the result of ‘reckless disregard’ for, or ‘willful blindness’ to, the copyright holder’s rights.” *Washington Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 674 (9th Cir. 2012). “[W]here the relevant facts are admitted or otherwise undisputed, willfulness can be appropriately resolved on summary judgment.” *UMG Recordings, Inc. v. Disco Azteca Distrib., Inc.*, 446 F. Supp. 2d 1164, 1174 (E.D. Cal. 2006) (citation omitted).

Here, Kaseberg has zero evidence to show that O’Brien or his writers were aware of the asserted jokes prior to O’Brien’s relevant performances. Nor does Kaseberg have any evidence to show that O’Brien recklessly disregarded Kaseberg’s rights when telling his monologue jokes. In fact, as explained above, Kaseberg cannot even establish that O’Brien or his writers had any access to Kaseberg’s jokes in order to willfully infringe any copyrights. Accordingly, based on all of the facts set forth above, Defendants respectfully request that this Court grant summary adjudication as to the issue of willfulness in Defendants’ favor.

V. CONCLUSION

For the aforementioned reasons, Defendants respectfully request that this Court grant their motion for summary judgment. However, if for any reason complete summary judgment cannot be granted, Defendants request that that this Court grant partial summary judgment, or in the alternative, grant summary adjudication of the issues that it deems appropriate.

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1 DATED: February 3, 2017

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